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# Supreme Court of the United States

OCTOBER TERM, 19[redacted] 63

No. [redacted]

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
*Petitioner,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
*Respondents.*

**BRIEF FOR RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, IN OPPOSITION TO PETITION FOR CERTIORARI AND SUMMARY REVERSAL OF JUDGMENT**

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# Supreme Court of the United States

OCTOBER TERM, 1959

No. 892

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela,
*Petitioner,*

*v.*

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C. A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO,
*Respondents.*

**BRIEF FOR RESPONDENTS, THE FIRST NATIONAL CITY BANK OF NEW YORK, FRENCH AMERICAN BANKING CORPORATION AND THE ROYAL BANK OF CANADA, IN OPPOSITION TO PETITION FOR CERTIORARI AND SUMMARY REVERSAL OF JUDGMENT**

This brief is submitted on behalf of The First National City Bank of New York (hereinafter referred to as "City Bank"), French American Banking Corporation (hereinafter referred to as "French American"), and The Royal Bank of Canada (herein-

References: "Pet." — Petition of Manuel Aristeguieta.
"R." — Original record in the Supreme Court.
"P. A." — Petitioner's Appendix. There are five appendices to the Petition, each separately paginated.

after referred to as "Royal Bank"), in opposition to petitioner's application for a writ of certiorari to review, and for summary reversal of, the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 29, 1960. That judgment directed that the United States District Court for the Southern District of Florida quash three subpoenas duces tecum which had been issued in Miami and served in New York City upon the respondent Banks.

The subpoenas duces tecum had been issued to obtain, by way of discovery, new and supporting evidence for use in an extradition proceeding against Marcos Perez Jimenez, pending in Miami, Florida, before The Honorable William C. Mathes, United States District Judge. In view of petitioner's application for summary reversal of the judgment of the Court of Appeals, we regret that this brief must necessarily be more comprehensive than is customary in answers to petitions for certiorari.

## Questions Presented

1. Does a district judge, sitting as an extradition magistrate, or a United States District Court, purportedly acting in aid of an extradition proceeding, have jurisdiction or power to issue subpoenas duces tecum on behalf of the demanding country in an extradition proceeding where neither the extradition treaty nor any statute enacted by Congress provides for such issuance?

2. May subpoenas duces tecum issued in an extradition proceeding be served upon a witness outside the district in which the extradition proceeding is being conducted, and more than one hundred miles from the place of hearing, when such service is not permitted

by any statute or by the Federal Rules of Civil Procedure, and when the Federal Rules of Criminal Procedure expressly provide that those Rules do not apply to extradition proceedings?

## Statement

From the sweeping demands of the subpoenas duces tecum and from the affidavit of Mr. Sidney S. Sachs, one of counsel for Venezuela, it is abundantly clear that petitioner is attempting to conduct the equivalent of a grand jury inquisition in the United States in order to discover, here, new evidence against the defendant, Jimenez, and others. In paragraph 7 of his affidavit, sworn to November 25, 1959, Mr. Sachs alleges (R. 7-8, 76):

> "The subpoenas requested are expected to produce evidence of the illegal conduct charged to defendant. It is expected that it will also disclose the method of the illegal concert of action between the defendant and others, as well as the extent and nature of a means for concealment of his illegal conduct adopted by the defendant."

The three Banks moved in the United States District Court for the Southern District of Florida to quash the subpoenas duces tecum served upon them in New York City, but their motion was denied, without opinion (R. 8-11, 15-21; P. A. 2, pp. 22-26). Thereafter, the Banks appealed to the Court of Appeals and made the contentions set forth immediately above (R. 31-33). The Court of Appeals reversed the decision of the District Court, without opinion, and remanded the case with a direction to quash the subpoenas duces tecum (R. 597-600, 601; P. A. 3, pp. 3-7). Petitioner now seeks review and reversal of this judgment of the Court of Appeals for the Fifth Circuit.

## The Facts

The salient facts are here summarized:

1. *Commencement of Extradition Proceedings.* On or about August 24, 1959 petitioner (hereinafter sometimes referred to as the "Demanding Country" or as "Venezuela") commenced a proceeding before The Honorable William C. Mathes, a United States District Judge, seeking the extradition to Venezuela of Marcos Perez Jimenez.

2. *First Attempt to Use Subpoenas Duces Tecum.* On or about November 10, 1959 City Bank and French American were served with deposition subpoenas duces tecum requiring their appearance at the United States Court House, Foley Square, New York City, and the production of records of bank accounts of twenty named persons and entities for the period March 14, 1949 to January 23, 1958. These records include copies of checks, drafts, bills of exchange, deposit and withdrawal slips, statements of account and all related correspondence.

3. *Subpoenas Duces Tecum Quashed.* Upon motion of Marcos Perez Jimenez in the extradition proceeding, an order was entered on November 16, 1959 vacating the notice of taking depositions of City Bank and the subpoenas issued pursuant thereto, on the ground that the Federal Rules of Civil Procedure were inapplicable and that the Federal Rules of Criminal Procedure would apply (R. 2-3, 72-73; P. A. 2, pp. 1-2).

On November 23, 1959 an order was entered vacating the order of November 16, 1959 in so far as it directed that the Federal Rules of Criminal Procedure should apply, but it did not affect that part of the prior order which vacated the notice of taking depositions and the subpoenas duces tecum issued pursuant to the Federal Rules of *Civil* Procedure (R. 3-4; P. A. 2, pp. 2-3).

4. *Second Attempt to Use Subpoenas Duces Tecum.* On or about December 2, 1959 City Bank, French American and Royal Bank were each served in New York City with a subpoena duces tecum returnable before the District Court in Miami, Florida, and requiring the production of records of bank accounts of twenty-one named persons and entities for the period March 14, 1949 to November 25, 1959 (P. A. 2, pp. 3-16). These records are the same records which were sought under the subpoenas referred to in paragraph 2 above, issued on or about November 10, 1959.

Thereafter the Banks moved to quash these subpoenas in the District Court in Miami, and on December 15, 1959 an order was entered denying the motion to quash (R. 8-11, 15-21; P. A. 2, pp. 22-26). On December 29, 1959 the Banks appealed from this order to the United States Court of Appeals for the Fifth Circuit (R. 31-33).

5. *Subpoenas Duces Tecum Quashed.* On January 29, 1960 the Court of Appeals unanimously held that the order of December 15, 1959 was final and appealable, and a majority of the Court held that the order should be vacated and the subpoenas duces tecum quashed. *Aristequieta* v. *Jimenez,* 274 F. 2d 206 (5th Cir. 1960).

6. *Pending Attempt to Use Subpoenas Duces Tecum.* Since that decision of the Court of Appeals of which petitioner now seeks review and reversal, petitioner has again attempted to compel production of the records which he sought by the subpoenas which the Court of Appeals quashed. On petitioner's motion, Judge Mathes on March 9, 1960 entered an order in the extradition proceeding granting to Venezuela permission to resort to the deposition procedure provided in Rules 26 and 45 and related provisions of the Federal Rules of

Civil Procedure, including the issuance of subpoenas duces tecum, to secure evidence from officials of the Banks in New York City (P. A. 2, pp. 31-33).

On or about March 15, 1960, each Bank was served with a deposition subpoena duces tecum requiring its appearance on April 18, 1960 at the United States Court House, Foley Square, New York City, and the production of records of bank accounts of twenty-two named persons and entities for the period March 14, 1949 to June 30, 1958. These records are the same voluminous records sought by each of the earlier subpoenas, referred to in paragraphs 2 and 4 above.

7. *Petition for Writ of Prohibition or Mandamus.* On March 16, 1960 the Banks applied to the Court of Appeals for the Fifth Circuit for permission to file a petition for a writ of prohibition or mandamus, directing Judge Mathes to vacate his order of March 9, 1960, on the ground that this order was contrary to the earlier decision and mandate of the Court of Appeals referred to in paragraph 5 above. But the Court of Appeals denied the application, stating:

> "The propriety of the action of the district court referred to in the proposed petition for writ of prohibition or mandamus was not before this Court nor decided by it and is not contrary to the mandate in No. 18176, decided January 29, 1960." (P. A. 3, pp. 15-16)

Thus, the Court held only that to grant to Venezuela permission to take depositions pursuant to subpoenas duces tecum was not a violation of its earlier mandate, since that mandate did not deal with notices of depositions and subpoenas duces tecum *issued in New York*, pursuant thereto. For the mandate had directed only that the subpoenas

duces tecum *issued in Florida and served in New York* on December 2, 1959 be quashed. Since the District Court had quashed those subpoenas, the Banks' application for mandamus was denied.

8. *Pending Proceedings in the Second Circuit.* The Banks then moved in the United States District Court for the Southern District of New York to quash the subpoenas duces tecum presently outstanding, but on May 13, 1960 Judge Ryan denied their motion. The Banks have now appealed to the United States Court of Appeals for the Second Circuit from that decision.

## Summary of Argument

### A. The petition for a writ of certiorari should be denied.

There are no "special and important" reasons for granting certiorari in this case. Neither petitioner nor the United States, as *amicus curiae,* has been able to point to a single instance in the history of this nation in which a subpoena of any type has been issued in aid of the demanding country in an extradition proceeding. Apparently Venezuela is the only demanding country which has ever sought to use the discovery procedures of the United States to gather evidence of guilt here for use in an extradition proceeding. Certainly the alleged needs of one petitioner do not make an issue one of grave and public importance.

Moreover, petitioner's request for a writ of certiorari ignores an important requirement long established by this Court for granting such writs: the requirement that the decision to be reviewed must not only be final but complete. Since the decision of the

Court of Appeals, Fifth Circuit, petitioner has applied for and received from Judge Mathes, the extradition judge, permission to take the testimony of the three Banks in New York, pursuant to deposition subpoenas duces tecum. Such subpoenas were served on the Banks on March 15, 1960 and are still outstanding (pp. 5-6, *supra*). Thus, petitioner has sought another opportunity to raise the question of the power of an extradition judge, or a District Court purportedly acting in aid of extradition, to issue subpoenas duces tecum on behalf of the demanding country.

**B. The request for summary reversal should be denied.**

Extradition is a non-judicial proceeding specifically regulated by statute and treaty, conducted before a magistrate of the United States (in this instance a district judge), and is not a proceeding within the jurisdiction of a United States District Court or of any court. The statute governing the extradition proceeding itself, 18 U. S. C. § 3184, confers jurisdiction only on "any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any state."

The hearing before the extradition judge is not a "case" or "controversy": there is no decision respecting the rights and duties of the parties to a controversy; no opportunity for the fugitive to raise matters in defense or to have his guilt or innocence determined; and no contentions of present or possible adverse parties submitted for adjudication. In addition, the extradition proceeding does not result in a final de-

cision, but is advisory only. The extradition magistrate merely certifies the evidence and his findings, if he concludes that extradition is warranted by such evidence, to the Secretary of State, who is not bound to extradite the fugitive.

Although the extradition magistrate exercises certain of the incidents common to judicial proceedings, such as the issuance of a warrant of arrest and the determination of "probable cause," there is no basis for concluding that the proceeding itself is a judicial proceeding. The proceeding is before an extradition magistrate who exercises only limited and quasi-judicial powers.

Neither the statutes governing extradition, 18 U. S. C. §§ 3181-95, nor the Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), authorizes the extradition magistrate to issue subpoenas duces tecum.

The subpoenas duces tecum which were quashed by the Court of Appeals for the Fifth Circuit were returnable before the United States District Court in Miami. But a United States District Court has no jurisdiction or power to act in aid of an extradition proceeding. The federal courts are courts of limited jurisdiction and can take cognizance only of those matters which Congress has entrusted to them by statute. No general power to issue subpoenas duces tecum inheres in United States District Courts; specific congressional authorization is necessary. No such congressional authorization exists.

*A fortiori* an extradition judge or commissioner has no inherent power to issue subpoenas duces tecum.

And, as we have pointed out, no statute or treaty grants this power.

The Federal Rules of Civil Procedure apply only to *suits* of a civil nature in district *courts*, and hence are not applicable to extradition. Moreover, a United States District Court cannot use the procedures provided in the Civil Rules in aid of a proceeding which is not before it or before another District Court.

The Federal Rules of Criminal Procedure "are not applicable to extradition." Rule 54(b)(5).

The "all writs" statute (28 U. S. C. § 1651) applies only to "courts established by Act of Congress," and therefore confers no power on the extradition magistrate. Moreover, a federal court can issue writs only in cases which are within its jurisdiction, and a United States District Court has no jurisdiction over an extradition proceeding. Finally, the "all writs" statute does not, in any event, increase or expand the jurisdiction of the courts.

The basic principle and purpose of extradition precludes the use, in the United States, of subpoenas or of discovery in any form to support the request of the demanding country. For extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality.

Even if the power exists for the issuance of subpoenas on behalf of the demanding country, there is no authority permitting their service beyond the usual territorial limits of process. These limits find expression in Rule 45 (e)(1) of the Federal Rules of Civil Procedure, which provides for service of subpoenas

only within the district or not more than 100 miles from the place of hearing.

Jurisdiction of federal courts is territorial, and a specific exception by Congress is necessary to extend it. No such exception exists in extradition. The "all writs" statute, on which petitioner relies, does not expand or extend the territorial jurisdiction even of the courts to which it applies.

## POINT I

**International extradition is a non-judicial proceeding, specifically regulated by statute and treaty, conducted before a magistrate of the United States—in the present case, a judge of a United States District Court—and is not a proceeding within the jurisdiction of a United States District Court or of any court.**

International extradition proceedings are *sui generis,* non-judicial in nature, and are not conducted in a United States District Court, in a "legislative court" or in any other court. The Jimenez extradition proceeding was commenced under a Treaty of Extradition between the United States and Venezuela, 43 Stat. 1698 (1923), and the federal extradition statutes, 18 U. S. C. §§ 3181 et seq., the pertinent provisions of both of which are set forth in Appendices A and B hereto.

The right of a foreign power to demand the extradition of one accused of crime and the correlative duty to surrender the accused exists only when created by treaty. In the United States, in the absence of statutory or treaty provisions, no authority exists to surrender a fugitive criminal to a foreign government. The right of extradition rests upon the principle of

comity, based upon the view that it is in the interests of all civilized communities that crimes should not go unpunished. But power to extradite an accused national of the demanding country must be found in the statute or treaty governing extradition. These principles are so thoroughly established as to require no detailed citation of authority.

## I

### The Applicable Federal Statutes

#### 1. General International Extradition Procedure—Title 18 U. S. C. § 3184

Under the provisions of Section 3184, jurisdiction over preliminary proceedings for extradition to a foreign country is, in the United States, vested solely in judges or justices of federal courts, commissioners expressly authorized by federal courts, and *judges of state courts of record of general jurisdiction.* Of utmost significance is the fact that the proceedings are not before a United States District Court or indeed before any court, but are before a justice, judge or commissioner sitting as a magistrate of the United States.*

Section 3184 provides that whenever, as here, there is a treaty of extradition between the United States and

* Annexed as an appendix to the memorandum for the United States as *amicus curiae* is the opinion of Judge Ryan denying the Banks' motion to quash (p. 7, supra).

Judge Ryan states (p. 9): that the extradition proceeding is pending in "the United States District Court for the Southern District of Florida, Miami Division". This is a fundamental error which pervades the entire opinion. Clearly, the extradition proceeding is not before a United States District Court but before a district judge only.

any foreign government, such magistrate may issue his warrant for the apprehension of any person found within his jurisdiction who has been charged upon a complaint made under oath with having committed, within the jurisdiction of the foreign government, any of the crimes provided for in the treaty.

A person so charged may then be brought before the magistrate "to the end that the evidence of criminality may be heard and considered." If, on such hearing, the magistrate "deems the evidence sufficient to sustain the charge . . . , he shall certify the same, together with a copy of all the testimony taken before him," to the Secretary of State of the United States. This is done in order that a warrant may issue upon the requisition of the proper authorities of the foreign government, for the surrender of the person charged. And, the magistrate shall then issue his warrant for the commitment to jail of the person charged until his surrender shall be made.

As will be shown hereinafter, Article XI of the treaty between the United States and Venezuela provides that application for the surrender of fugitives shall be made by the diplomatic agents of the demanding government or, in certain instances, by its superior consular officers. And the *judicial functionaries* of the demanding country must prescribe the method of complying with the legal formalities of the country of asylum, that is, the country of which the extradition is requested—in the present case, the United States.

Clearly the federal statute, Section 3184, confers authority to arrest and hear evidence of criminality only upon a federal judge or justice, upon a commissioner properly empowered or upon *any judge* of a

court of record of general jurisdiction *of any state*. No grant of jurisdiction is made to a United States District Court or to any other court. That Congress chose to place the responsibility for extradition hearings upon judges or others trained in the law was obviously sound, for such individuals are familiar with the concept of "probable cause" and are skilled in the evaluation of evidence.

A state or federal judge is, when hearing an extradition proceeding, a magistrate of the United States, and the proceeding is not a suit, prosecution or proceeding in the court of which he is a judge. Thus in *In re Keene's Extradition*, 6 F. Supp. 308 (S. D. Texas 1934), a fugitive made application to the United States District Court for the removal to the District Court of an extradition proceeding pending before a state court judge. The District Court held, however, that the extradition proceeding could not be removed since it was neither a civil suit nor a criminal prosecution commenced in a state court. The Court said (p. 309):

> "... The proceeding before Judge Mullally was neither under nor by virtue of a state law, nor was it in, nor commenced in, the state court of which he is judge. *It was before him under the treaties and laws of the United States, and as a magistrate of the United States.*
>
> "Section 651 [predecessor of Section 3184] gives any justice of the Supreme Court of the United States the same jurisdiction in extradition matters as is given a state court judge, yet it would hardly be contended that there would be commenced a suit in the United States Supreme Court should a justice thereof see fit to proceed under

such section and/or such treaty." (Emphasis added)

**2. Hearing and Evidence before the Extradition Magistrate—Title 18 U. S. C. § 3190**

Under the provisions of Title 18 U. S. C. § 3184 a person arrested on an extradition warrant is entitled to a hearing within the state or district in which he is found. But the hearing before the extradition magistrate is of limited scope, and is of the nature of a preliminary hearing or examination relating only to possible commitment for future trial. The magistrate is required by the statute, if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, to certify such evidence, together with a copy of the testimony taken before him, to the Secretary of State.

The depositions, warrants or other papers or copies thereof offered in evidence under Section 3190 *by the demanding country* are to be received and admitted as evidence for all purposes of the hearing. This is subject to the condition, however, that such papers shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals *of the demanding country*. To enforce observance of this condition, the certificate of the principal diplomatic or consular *officer of the United States resident in the demanding country* shall be proof that the documents offered are authenticated in the manner required.

To justify a magistrate in committing a prisoner for extradition to a foreign country, it is not necessary that the evidence be sufficient to convict. All that is required is that the evidence be such as would be deemed suffi-

cient to justify holding the prisoner for trial if the offense had been committed where the accused is found. The requirement is satisfied by evidence affording reasonable ground to believe that the accused is guilty of the offense with which he is charged and that it is an offense within the treaty.

Under Section 3190 it is clear that the depositions and other documents which a demanding country may produce in support of the charge made are only those which it has obtained *in the demanding country.* To find that the section authorizes the taking of depositions in the United States, pursuant to the Federal Rules of Civil Procedure or otherwise, would require a tortured interpretation, taking the word "depositions" and "other papers or copies thereof" wholly outside the context and import of the section. We have not found, nor have our adversaries cited, a single case where depositions produced by the demanding country were obtained by discovery proceedings through the use of United States courts or other judicial procedures.

In *Charlton* v. *Kelly,* 229 U. S. 447, 459-60 (1913), the Supreme Court described the procedure upon an extradition proceeding as follows, quoting *Benson* v. *McMahon,* 127 U. S. 457, 462-63 (1888):

> " 'Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magis-

trate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that "the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." This describes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

" 'We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government.' "

That Section 3190 obviously relates only to evidence offered by the demanding country and gives no right to the accused to introduce such evidence is clear from

*In re Luis Oteiza y Cortes,* 136 U. S. 330, 336-37 (1890). In that case the Supreme Court stated that the predecessor to Section 3190:

> ". . . applies only to papers or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended; and that it does not apply to documents or depositions offered on the part of the accused . . . ."

Moreover, the *Oteiza* case strongly suggests that the fugitive may not introduce any documentary evidence from any source but is restricted to the presentation of oral testimony, extremely limited in scope. He may not introduce any matters in defense of the charges made against him, nor may he cross examine the witnesses for the demanding country, nor may he rebut the evidence offered by the demanding country. *Charlton* v. *Kelly, supra.*

Thus, the fugitive cannot introduce, among other things, evidence showing: that he is insane, *Charlton* v. *Kelly, supra;* that he has an alibi, *Desmond* v. *Eggers,* 18 F. 2d 503 (9th Cir. 1927); or that the statute of limitations has run before extradition is sought, *Hatfield* v. *Guay,* 87 F. 2d 358 (1st Cir. 1937), *cert. denied,* 300 U. S. 678 (1937). For, those are defenses which may properly be raised only on his trial after extradition to the demanding country. The extradition proceeding itself is, in no sense, a trial.

**3. Witnesses for Indigent Fugitives—Title 18 U. S. C. § 3191**

This section provides in brief: that the extradition judge or commissioner may subpoena witnesses at the expense of the United States, on behalf of an indigent fugitive, on his showing by affidavit that certain condi-

tions specified in the section exist. Among those conditions are statements that there are witnesses "whose evidence is material to his defense," and that "he cannot safely go to trial without them."

At first blush this section might seem to suggest that an indigent fugitive would have liberal rights to adduce testimony in his own defense. Actually, his rights are extremely limited. For the Supreme Court has held in *Charlton* v. *Kelly, supra,* that the word "trial" in the section does not alter the type of proceeding stipulated by statute and treaty, and does not give to the accused any greater right to introduce evidence than he otherwise has. The Court said (p. 458):

> *"The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty.* To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. *True, the statute speaks of evidence 'material for his defense, without which he cannot safely go to trial,' but we cannot discover that Congress intended to depart from the provisions of Article I* of the treaty which requires that a surrender shall be made 'upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed.'" (Emphasis added)

Particularly, it should be noted that Section 3191 is limited in application to a subpoena issued on behalf

of an *indigent fugitive* and that no other subpoena power is granted to the judge or commissioner sitting as a committing magistrate. When Congress has thus expressly limited the application of Section 3191 to subpoenas on behalf of indigent fugitives, there is no warrant for any court to ignore that limitation and to authorize subpoenas duces tecum on behalf of the demanding country. Manifestly, the doctrine of *expressio unius, exclusio alterius* should apply. For, if there were any intent under the governing statutes to give a broad power of subpoena and discovery to the *demanding country*, Congress would have said so, expressly. This it has not done.

It is obviously one thing to speculate about the possible extension of this section by implication to cover all fugitives—rich as well as poor; but it is quite another to assert that it confers upon the *demanding country* unlimited power of discovery by subpoenas duces tecum and otherwise. The demanding country already has a great preponderance of advantage.

Furthermore, it seems clear that Section 3191 is limited to subpoenas calling only for the appearance and oral testimony of witnesses for the indigent fugitive, and does not extend to the compulsory production and surrender of documents pursuant to subpoenas duces tecum. This is the thrust of the Supreme Court's views as stated in the *Oteiza* case, *supra*. Moreover, under the doctrine of *Ex Parte Moses*, 53 Fed. 346 (E. D. Pa. 1892), and *In re Outcault*, 149 Fed. 228 (S. D. N. Y. 1906), unless the authority to issue subpoenas duces tecum is specifically granted, the only subpoena that may be issued is one calling for the appearance of witnesses and oral testimony.

## II

## The Extradition Treaty Between the United States and Venezuela

### Article I—Reciprocal Delivery of Persons Charged with Crime

Under this Article the United States and Venezuela agree to deliver up to justice any person who may be charged with any of the crimes specified in *Article II*. *Article I* expressly provides:

> "... Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there."

### Article XI—The Duties of the Demanding Country

This Article so far as pertinent provides with respect to requisitions: that applications for the surrender of fugitives shall be made by the diplomatic agents of the United States or of Venezuela, or in certain instances by superior consular officers. With reference to the procedure to be followed by the demanding country in order to secure a "preliminary arrest" the Article provides:

> "It shall be competent for such diplomatic or superior Consular officers to ask and obtain the *preliminary arrest* of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested." (Emphasis added)

This provision obviously deals only with the "preliminary arrest" of the fugitive and not with the subsequent hearing before the extradition judge or magistrate. It is the duty of the judicial functionaries or officers of the demanding country (Venezuela) to prescribe such methods for accomplishing the preliminary arrest of the fugitive as are necessary to comply with legal formalities in the United States.

But Venezuela contends that the term "judicial functionaries" refers to the extradition magistrate in the country of asylum (Pet. 19, 34). Not so! *Article XI* provides only that the "*funcionarios judiciales*" of the demanding country shall prescribe the method of complying with the legal formalities of the asylum country in order "to ask and obtain the *preliminary arrest* of the person whose surrender is requested." Nothing in *Article XI* requires the demanding country to "prescribe the method" to be used at the hearing before the "*juez o magistrado,*" as the committing magistrate is called in the Spanish counterpart of *Article XII,* which deals only with the duties of the extradition judge or magistrate.

Moreover, there is nothing unusual about the fact that in certain respects Venezuela must devise methods of complying with United States law. The treaty itself imposes such duties upon the demanding country. Thus *Article I* requires the demanding country to produce evidence with respect to the fugitive which would "justify his detention and commitment for trial if the crime or offense had been committed" in the United States. In addition, the demanding country must see to it that its documentary evidence has been authenticated as required by the United States statute, 18 U. S. C. § 3190.

It would be incredible, however, if the magistrate were, in fact, empowered to invent his own rules as he goes along, as the petitioner here suggests. How can Venezuela consistently urge, on the one hand, that extradition is a judicial proceeding subject to established judicial procedures, and, on the other, insist that the procedures are left to the personal improvisation of the extradition judge? (Pet. 17-18, 20-24, 34, 39)

*Article XI* then further provides, with respect to the proof which the demanding country must submit in support of its request, that where the fugitive is merely charged with a crime rather than having been convicted in the demanding country:

> "... a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case."

The final phrase of the quoted sentence, "with such other evidence or proof as may be deemed competent in the case," clearly refers to proof in addition to the warrant of arrest and supporting depositions—all of which must, under 18 U. S. C. § 3190, originate in and be authenticated according to the laws of the demanding country.

Venezuela asserts that the quoted language is authority for the discovery and collection of documentary evidence in the United States, but no such conclusion is warranted (Pet. 31-33). The only statutory provision relating to documentary evidence produced by the demanding country is 18 U. S. C. § 3190, which requires that documentary evidence be authen-

ticated so as to entitle such evidence to be received for similar purposes *by the tribunals of the demanding country,* and provides that a certificate of the United States diplomatic or consular officer *resident in the demanding country* shall be proof of proper authentication. Thus, documents not properly authenticated under this section are clearly incompetent in the extradition proceeding.

The inescapable conclusion is that *all* documentary evidence submitted by the demanding country at the extradition hearing, with one specific and limited exception, must be discovered and assembled in the *demanding country,* otherwise such evidence could not be authenticated pursuant to the provisions of Section 3190, and would not be competent at the hearing.

The only reference, either in the treaty or in the governing statutes, to the use of evidence discovered in the United States, the country of asylum, appears in *Article X* of the Treaty. This relates to the one specific and limited exception just referred to. *Article X* provides, among other things:

> *"Everything found in the possession of the fugitive criminal at the time of his arrest,* whether being the proceeds of the crime or offense, or *which may be material as evidence in making proof of the crime,* shall, so far as practicable . . . be delivered up with his person at the time of the surrender. Nevertheless, the rights of a third party with respect to the articles aforesaid shall be duly respected." (Emphasis added)

Had the United States and Venezuela intended to make *general* provision for the discovery and assembly of evidence in the United States as proof of crimes charged in the demanding country, they would reason-

ably have been expected so to provide in *Article X*. But they did not do so there, or anywhere else. On the contrary, they made only this one specific and narrow exception. The rule of *expressio unius* applies.

**Article XII—Duties of the Extradition Judge or Magistrate**

*Article XII*, it should be noted, expressly refers three times to the officer presiding at the hearing as a "judge or a magistrate." The presiding extradition officer is nowhere referred to as a "judicial functionary" as are the officers of the demanding country who, under *Article XI*, must prescribe the method of compliance with the legal formalities of the country of asylum in order to secure the "preliminary arrest" of the accused. Neither in this Article nor elsewhere in the treaty is there any reference made to a court.

## POINT II

**International extradition is not a judicial proceeding in a United States District Court, involving a case or controversy, permitting and requiring the exercise of full judicial power.**

A judicial proceeding is one in which parties litigate their respective rights and duties in some case or controversy before a court of justice. Each party has the same opportunity to present all matters favorable to its cause and the processes of the court are equally available to all. After hearing all of the legally admissible evidence presented by each party, the court renders a judgment which is binding on the parties and which is final, subject only to possible appeal to a higher judicial tribunal. In sum, there must be a case or controversy susceptible of adjudication, submitted to a

judicial tribunal which has the power to render a final and binding determination.

As was said in *Laubenheimer* v. *Factor*, 61 F. 2d 626, 628 (7th Cir. 1932), *aff'd*, 290 U. S. 276 (1933):

> "Under our law, extradition is not a judicial function; it is reposed in the Department of State."

**1. An Extradition Proceeding is Not a "Case" or "Controversy"**

The terms "case" and "controversy" were defined by Mr. Justice Field in *In re Pacific Railway Commission*, 32 Fed. 241, 255 (N. D. Cal. 1887), as follows:

> ". . . By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

This definition was quoted with approval by the United States Supreme Court in *Muskrat* v. *United States*, 219 U. S. 346, 356 (1911), in which the Court held that:

> ". . . by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred."

Applying these tests, it is apparent that international extradition is not a judicial proceeding. A "decision" in an extradition proceeding is advisory, and merely informs the Executive Department that there is sufficient evidence to sustain a charge. It is not the determination of a case or controversy. There is in an extradition proceeding no decision respecting the rights and duties of parties to a controversy; no opportunity for the fugitive to raise matters in defense or to have his guilt or innocence determined; and no contentions of present or possible adverse parties "submitted to the court for adjudication."

**2. An Extradition Proceeding Does Not Result in a Final Decision***

One of the essential attributes of all judicial proceedings is that a final and binding determination of the rights and duties of the parties involved must be reached at some point within the judicial hierarchy. In so holding, the Supreme Court, in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864), stated:

> "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it."

The conclusion that an extradition proceeding lacks the finality necessary to a judicial determination is supported by an opinion of the Attorney General of the United States, rendered in 1843, dealing with a proceeding under the Extradition Treaty of 1842 with Great Britain (4 Op. Att. Gen. 201, 210-11):

> *"This is not a case in law or equity within the scope and meaning of the first clause of the second*

* The memorandum for the United States as *amicus curiae* (pp. 3-4), in effect, concedes this.

*section of the third article of the constitution of the United States.* The provisions of that section are applicable only to cases which assume a legal form for forensic litigation and judicial decision, in which a final judgment may be rendered, and by whose decision the parties will be bound. *It does not contemplate a question of the description under consideration, in reference to which a preliminary proceeding is authorized as ancillary to a power in its nature political, created not by the constitution, but emanating from the concurrent wills of two independent governments.* Had the treaty conferred upon the magistrate—if it could have been made competent to such an object—the power of trying the person charged for an offense committed within a foreign jurisdiction, and of punishing in case of ascertained guilt, the inquiry might have presented itself in a different aspect. But the stipulations under examination aim at no such end, but are confined to the ascertainment of facts which can weigh nothing in any consequent and purely judicial investigation of the charge.

"It would seem to be clear, too, if the case be one of judicial cognizance under and by force of the constitution, that the jurisdiction once attaching would adhere to the subject till it had been definitely disposed of—a proposition which can in no sense be predicated of an offense committed within the dominions of a foreign power." (Emphasis added)

### 3. An Extradition Proceeding is Not a Judicial Proceeding Merely Because the Magistrate Exercises Certain of the Incidents of Judicial Power

While it is true that the extradition magistrate exercises certain incidents of judicial power, such as the right to issue a warrant of arrest and to determine "probable cause," there is no basis for assuming that

the proceeding itself is a judicial proceeding. The Supreme Court considered this problem in *United States* v. *Ferreira*, 13 How. (54 U. S.) 40 (1851), with respect to a proceeding similar to extradition.

That case dealt with an act of Congress implementing the treaty of 1819 with Spain which ceded Florida to the United States. 3 Stat. 768 (1823). The act provided that judges of certain courts in Florida should receive and adjudge certain claims and further provided:

> ". . . That, in all cases in which said judges shall decide in favour of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favour the same is adjudged, out of any money in the treasury, not otherwise appropriated."

The district judge allowed Ferreira's claim, and the United States sought to appeal from this allowance. The Court decided that the proceedings were non-judicial in nature and stated (pp. 47-48):

> "*It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of congress did not intend to make it one.* The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the *territorial limits* to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. . . .
>
> * * * * *

> *"The powers conferred by these acts of congress upon the judge as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them.* But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. *But it is not judicial in either case, in the sense in which judicial power is granted by the constitution to the courts of the United States."* (Emphasis added)

A comparison of the claim proceedings in the *Ferreira* case, *supra,* with an extradition proceeding makes it apparent that the views there expressed by the Supreme Court are equally applicable to an extradition proceeding. For in both proceedings: the "decision" of the judge is not final, but must be certified, together with all evidence, to the Secretary of an Executive Department of the Government; no appeal lies to the courts from the "decision" of the judge; and the authority to conduct the proceedings was conferred by Congress upon judges, and not upon courts.

## POINT III

**Neither an extradition magistrate, nor a United States District Court purportedly acting in aid of extradition, has power to authorize or issue subpoenas duces tecum, or to authorize the use of discovery proceedings, on behalf of the demanding country.**

### I

1. It is indisputable that federal district courts are courts of limited jurisdiction and possess only such

jurisdiction as Congress has, by statute, conferred upon them. In *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir. 1957), *cert. denied*, 356 U. S. 960 (1958), *rehearing denied*, 357 U. S. 924 (1958), this proposition was stated as follows (p. 917):

> "The federal courts are courts of limited jurisdiction and can take cognizance of only those matters which Congress has entrusted to them by statute."

The limitations on the jurisdiction of federal district courts are stated in *Moore's Federal Practice* (Second ed. 1959, vol. 1, pp. 607-8):

> ". . . Federal courts . . . have a jurisdiction that is limited in two respects. First, federal judicial power embraces only the matters enumerated in the Constitution. Second, aside from the Supreme Court, federal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them. In brief, the jurisdiction of the district courts, then, is limited to that which Congress has granted them by a valid statute."

No general power to issue subpoenas duces tecum inheres in United States District Courts. As with all other exercises of judicial power by a District Court, the power to issue subpoenas is limited to those situations in which Congress has conferred such power on the Court. *Janssen* v. *Belding-Corticelli, Ltd.*, 84 F. 2d 577 (3rd Cir. 1936).

*A fortiori* an extradition judge or commissioner has no inherent power to issue subpoenas. This principle was succinctly stated in *In re Pacific Tele-*

*phone & Telegraph Co.*, 38 F. 2d 833, 836, 837 (N. D. Cal. 1930):

> "It is further argued that the fact that a United States commissioner, in passing upon the question of probable cause sufficient to support the application for a search warrant, is acting judicially is a sufficient basis for implying power to subpoena witnesses in aid of the judicial function. *The mere exercise of judicial power does not invest a functionary with the aids to jurisdiction peculiar to courts of record.* . . . In other words, the powers of the United States commissioners are quasi judicial only, and, unless the plain language of a statute confers authority, the nature of his function is an insufficient basis for enlarging his jurisdiction. . . ."
>
> * * * * *
>
> ". . . The Espionage Act . . . confers concurrent power to issue search warrants upon a judge of a United States District Court, or a judge of a state or territorial court of record, or an United States commissioner. While the act of issuing a search warrant presupposes a 'judicial' hearing, such hearing is quasi judicial only, and the official issuing the warrant is acting as a magistrate rather than as a judge of this court. . . . There must be some proceeding pending over which the court has or may assume jurisdiction."

2. Patently the Federal Rules of *Civil* Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition. The discovery procedures outlined in the Civil Rules are designed to be used in the course of a *civil action* pending in a federal court and cannot be utilized independently of such action. Thus

Rule 1, which sets forth the application of the Civil Rules, states:

> *"Rule 1. Scope of Rules*
>
> These rules govern the procedure in the United States district *courts* in all *suits* of a civil nature whether cognizable as *cases* at law or in equity...." (Emphasis added)

A District Court has no power, therefore, to use such procedures in aid of a proceeding which is not pending before it or before another District Court.

> *Beard* v. *New York Central RR.*, 20 F. R. D. 607 (N. D. Ohio 1957);
>
> *Commercial Solvents Corp.* v. *Louisiana Liquid Fertilizer Co.*, 20 F. R. D. 359 (S. D. N. Y. 1957);
>
> *Amand* v. *Pennsylvania RR.*, 17 F. R. D. 290 (D. N. J. 1955);
>
> *Bachrach* v. *General Investment Corp.*, 31 F. Supp. 84 (S. D. N. Y. 1940).

3. The Federal Rules of *Criminal* Procedure apply neither to an extradition proceeding nor to a purported proceeding in a United States District Court in aid of extradition. For Rule 54(b)(5) provides: "These rules are not applicable to extradition and rendition of fugitives . . . ."

4. Petitioner asserts that the "all writs" statute (28 U. S. C. § 1651) grants power to the extradition judge to issue subpoenas in aid of an extradition proceeding (Pet. 14, 18, 24-27). But Section 1651 provides:

> "The Supreme Court and all *courts* established by Act of Congress may issue all writs necessary

> or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." (Emphasis added)

Clearly the language of the section, itself, contains the answer to petitioner's assertion. For the writs referred to can only be used in aid of the jurisdiction of the *court* issuing the writ, not, as petitioner contends, in aid of the jurisdiction of the district judge over an extradition proceeding. Moreover, a federal court can issue writs only in cases which are within its jurisdiction, and a United States District Court has no jurisdiction whatsoever over an extradition proceeding.

Finally, the "all writs" statute does not increase or expand the jurisdiction of the courts. *United States* v. *First Federal Savings and Loan Ass'n,* 248 F. 2d 804 (7th Cir. 1957). Thus the "all writs" statute is inapplicable.

The cases cited in support of petitioner's contention (Pet. 14, 18, 25) obviously have no application. *American Lithographic Co.* v. *Werckmeister,* 221 U. S. 603 (1911), involved an action for copyright infringement, and the Supreme Court held that the predecessor to Section 1651, the "all writs" statute, gave the trial court authority to issue subpoenas duces tecum to compel the production of documents for use in the civil action before it. However, there is no suggestion in the opinion that such subpoenas could be issued in aid of a proceeding other than the one pending in the court below. In addition, the trial court patently had jurisdiction over the suit itself, and therefore the "all writs" statute was properly invoked to supply ancillary procedures.

The other two cases relied upon by petitioner, *Kamen Soap Products Co.* v. *United States,* 110 F. Supp. 430 (Ct. Cl. 1953), and *Bethlehem Shipbuilding Corp.* v. *NLRB,* 120 F. 2d 126 (1st Cir. 1941), have no bearing for the same reasons as those discussed with respect to the *Werckmeister* case. For both cases involved the use of subpoenas by a court in a proceeding pending before that court, and in each case the court clearly had jurisdiction over the judicial proceeding before it.

Petitioner further contends (Pet. 18-19) that a United States District Court may exercise judicial power to assist the conduct of proceedings before a district judge, citing *The United States, Petitioner,* 194 U. S. 194 (1904), and *United States* v. *Tom Wah,* 160 Fed. 207 (N. D. N. Y. 1908), *aff'd,* 163 Fed. 1008 (2d Cir. 1908). This is erroneous. A United States District Court, as we have shown, can exercise no powers unless authorized to do so by Congress. But petitioner cites no such authorization in support of its contention and none can be found anywhere.

*The United States, Petitioner, supra,* holds only that a particular statute allowing an appeal "to the judge of the District Court for the district" should be construed as providing for an appeal to the District Court itself. The Court stated (p. 200):

> "While it must be admitted that the proper construction of section 13 is not free from difficulty, we are not willing to change the construction we have heretofore repeatedly recognized as correct, and which we think has been adopted by Congressional . . . [reenactment]."

Moreover, in that case the proceeding involved was a judicial one cognizable by a United States District

Court. In fact, the statute specifically permitted it to be brought before a United States District Court. An extradition proceeding, on the other hand, is non-judicial and is wholly outside the competency of a federal court.

*United States* v. *Tom Wah, supra,* was a case involving the same statute. The Court held that a District Court could use its powers in aid of a proceeding before a United States commissioner, but the necessary basis for this holding was the Court's conclusion that the statutory provisions "in the first instance commit the jurisdiction of such cases to the United States District Courts . . . ."

5. The Treaty of Extradition between the United States and the Republic of Venezuela, 43 Stat. 1698 (1923), as we have shown, contains no provision authorizing the use by the demanding country of discovery procedures in the asylum country.

6. The statutes governing extradition (18 U. S. C. §§ 3181-95) are barren of any provision which authorizes the use by the demanding country of discovery procedures in the United States.

## II

The basic principle and purpose of extradition precludes the use of subpoenas or of discovery in any form to support the request of the demanding country. For extradition presupposes that the demanding country will come to the asylum country with *prima facie* proof of criminality. It is not expected, and no procedure is provided to permit the demanding country to use the judicial apparatus of the asylum country to investigate or to establish the proof of the commission of a crime.

It is an established rule of international law that the courts of one country will not seek to enforce the penal laws of another. The *Restatement of Law—Conflict of Laws* states:

> "The criminal law of a state represents the peculiarly local policy of that state and no other state will undertake to enforce such policy by the prosecution of persons who have violated the criminal law of that state." (Section 427, comment (*a*))

It is apparent, as we have shown from the affidavit of Sidney S. Sachs, *supra,* p. 3, that the demanding country seeks exactly that: to use the judicial apparatus of the United States, the asylum country, to discover and assemble proof of the commission of crimes alleged to have been committed in Venezuela.

The nature of extradition is itself convincing proof that any type of discovery proceeding by the demanding country in the country of asylum is unwarranted. The fact that no authority can be found anywhere to justify such procedure does not create an implication that the extradition judge may therefore promulgate his own rules of discovery. Rather, it reinforces the conclusion that no power of discovery exists.

## POINT IV

**Even if the subpoena power were held to exist in aid of extradition proceedings, a subpoena duces tecum issued by a District Court or by an extradition magistrate on behalf of the demanding country may not be served outside the district and more than one hundred miles from the place of hearing.**

Even if the District Court or the extradition judge had power to issue the subpoenas duces tecum, there is no basis in the treaty, statutes, judicial decisions or in

any rule of court which would justify their service beyond the usual territorial limits of process. Thus the Federal Rules of Civil Procedure provide in Rule 45(e)(1) for service only within the district or, if without the district, not more than 100 miles from the place of hearing.

The only conceivable basis for the service of the subpoenas upon the Banks in New York City is found in Rule 17(e)(1) of the Federal Rules of *Criminal* Procedure which states:

> "A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States."

But, Rule 54(b)(5) of the Criminal Rules flatly states: "These rules are not applicable to extradition and rendition of fugitives . . . ."

Since the Criminal Rules are not applicable, and the territorial limitation of the Civil Rules has not been complied with, from what source does the alleged power to issue such nationwide process flow? It certainly cannot derive from general principles of law, for as the Supreme Court stated in *Georgia* v. *Pennsylvania RR.*, 324 U. S. 439, 467-68 (1945):

> ". . . Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district."

The Supreme Court has further held that a *specific exception* to this rule by congressional action is a prerequisite to the extension of the District Court's jurisdiction beyond its territorial limits. In *Ahrens* v. *Clark*, 335 U. S. 188, 190 (1948), this Court stated:

> "We start from the accepted premise that apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial."

But here there is no exception. Rather, Section 3184 itself clearly indicates that the extradition magistrate cannot issue process beyond the territorial limits of his jurisdiction. For that section authorizes the magistrate to issue a warrant of arrest *only* if the fugitive is "found within his jurisdiction."

Even if the "all writs" statute were held to grant the court power to issue subpoenas duces tecum, that power would still be subject to the general territorial limitations of the District Court. Thus in *Edgerly* v. *Kennelly*, 215 F. 2d 420, 422 (7th Cir. 1954), the Court of Appeals upheld a denial of a writ of habeas corpus, stating:

> ". . . While the section [the 'all writs' statute] augments the power of a court in cases of existing jurisdiction, it in no wise expands or extends its territorial jurisdiction."

There is another compelling reason, however, for rejecting the contention that the extradition judge had power to authorize service of the subpoenas duces tecum outside his territorial jurisdiction. For it is of notable significance that under 18 U. S. C. § 3184 extradition proceedings may be commenced before a federal justice, judge or commissioner, or before a *state court judge*. And there is nothing in the statute to indicate that any one of these officials is invested with more or less power than the other. That Congress could ever have intended that *state court judges* could issue process which would run throughout the entire nation is incredible. Clearly Congress never had such intention and never granted such power.

## POINT V

**Petitioner has shown no valid reason for granting certiorari and none for a summary reversal.**

Petitioner argues that this Court should grant certiorari in order that the Court might aid in enforcing the obligations of the United States under the Treaty of Extradition with Venezuela (Pet. 12-13). But petitioner cannot point to any obligation of the United States under that treaty which requires the issuance of subpoenas duces tecum or any other discovery procedure, by the United States, to assist in the gathering of evidence of guilt against a fugitive. Indeed, *Article XI* of the Treaty makes it clear, as we have shown, that the evidence upon which the surrender of fugitives is based is evidence to be *produced by the demanding country.*

Petitioner also asserts that the issue he seeks to present to this Court is a grave issue affecting the international relations of this country with the republics of South America and of the world (Pet. 17). But petitioner has not pointed to a single instance in the history of this nation where a subpoena duces tecum has been issued in aid of the demanding country. Moreover, the United States Department of Justice, in its brief *amicus curiae* before the Court of Appeals for the Fifth Circuit and in its memorandum *amicus curiae* in this Court, has been unable to produce, from its vast archives covering almost 200 years, a single case in which a subpoena duces tecum had been issued in aid of a demanding country. Apparently, Venezuela, represented by petitioner, is the only demanding country which has ever sought to use the discovery procedures of the United States to gather evidence of guilt

in an extradition proceeding. Certainly the alleged needs of one petitioner do not make an issue one of grave and public importance. As this Court said in *Fields* v. *United States*, 205 U. S. 292, 296 (1907):

> "In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance."

Petitioner also contends that it is established practice in extradition proceedings for the demanding country to offer evidence in addition to that on which the original warrant of arrest was based (Pet. 14). He asserts that evidence gathered in the asylum country has been produced in other extradition proceedings (Pet. 14, 32-33). But again, petitioner fails to cite one case in which the evidence produced by the demanding country was, in fact, evidence *obtained by use of discovery procedures in the asylum country.*

None of the cases cited by petitioner (Pet. 14, 32) is relevant to the issues here presented. Thus, *Bingham* v. *Bradley*, 241 U. S. 511 (1916), involved an appeal from an order denying an application for a writ of habeas corpus by a fugitive in an extradition proceeding brought by Canada to secure his return from the United States. There was no indication whatsoever, in the record or elsewhere, of resort to any form of discovery or to the use of subpoenas duces tecum. Hence the case has no relevance.

In *McNamara* v. *Henkel*, 226 U. S. 520 (1913), as in the *Bingham* case, the proceeding also came before

the Supreme Court upon appeal from the denial of an application for a writ of habeas corpus. Extradition had been sought, by Canada, of a fugitive arrested in New York. In the record, reference is made to the oral testimony of one Canadian witness who had testified earlier before the commissioner, as to events which occurred solely in Canada, with respect to another charge. His testimony had then been read into the record in connection with the charge with which the Supreme Court was concerned. That case has no discernible bearing here.

Petitioner finally falls back on the general principle of liberal construction of treaty provisions (Pet. 14-15, 19, 27, 39). But there is no provision in the treaty of extradition which, no matter how liberally construed, suggests that the discovery power of the asylum country is available to gather evidence of the guilt of the fugitive.

Moreover, petitioner's request for a writ of certiorari ignores an important requirement long established by this Court for granting such writs: the requirement that the decision to be reviewed must not only be final, but complete. The decision of the Court of Appeals for the Fifth Circuit has not been treated by petitioner as finally determinative of the issues there presented. For petitioner is presently attempting to use alternative means to subpoena the records sought by the subpoenas quashed by the Court of Appeals.

Thus, on March 7, 1960, petitioner applied for and received from Judge Mathes, the extradition judge, permission to take the depositions of the three Banks, in New York. Petitioner then served three deposition

notices, and procured the issuance by the United States District Court for the Southern District of New York of subpoenas duces tecum directed to each of the Banks. Those subpoenas were served on March 15, 1960, and are still outstanding.

In thus pursuing its attempt to subpoena the records of the Banks through the deposition procedure, petitioner has maintained, in fact, that success in obtaining the evidence sought by these depositions would make it unnecessary for this Court to review the decision of the Court of Appeals for the Fifth Circuit. In its motion for permission to take depositions, made before Judge Mathes on March 7, 1960, petitioner's counsel stated:

> "It would seem, therefore, that there should be prompt pursuit by the plaintiff of means other than those ordered by Judge Mathes on November 25, 1959, to assure production of evidence. If other means are permitted, and are accomplished prior to Supreme Court review of the order of the Court of Appeals, such review will be mooted [*sic*]. . . ."

This Court will not allow an appeal or grant certiorari where the judgment appealed from is not both a final and complete determination of the rights of the parties. The decision of Mr. Justice Brandeis in *Collins* v. *Miller,* 252 U. S. 364 (1920), sets forth the rule in a situation very similar to the present. In that case, the relator had been arrested in extradition proceedings for three separate crimes, and the extradition judge found the evidence sufficient as to all three crimes charged. Subsequently a writ of habeas corpus was granted by the District Court as to two of the charges, but denied as to the third. The District Court, however, directed the extradition judge to hear further

evidence on the two charges with respect to which the writ was granted, but no further evidence was, in fact, heard. The fugitive then appealed to this Court from the decision of the District Court, but this Court dismissed his appeal for want of jurisdiction, on the ground that the decision was not final and complete as to the whole controversy. Mr. Justice Brandeis said (p. 370):

> "... A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. *United States* v. *Girault*, 11 How. 22, 32; *Holcombe* v. *McKusick*, 20 How. 552, 554; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 4; *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429, 431; *Dainese* v. *Kendall*, 119 U. S. 53; *Covington* v. *Covington First National Bank*, 185 U. S. 270, 277; *Heike* v. *United States*, 217 U. S. 423, 429; *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339, 346. And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

Obviously, Judge Mathes, to whom the present proceeding came on remand, has not treated the order of the Court of Appeals, Fifth Circuit, as a final and complete judgment on the merits, but has *authorized further proceedings* by permitting a possible alternate means of granting petitioner's request. His action after remand, and the issuance of subpoenas duces tecum by the United States District Court for the Southern District of New York, has given petitioner another opportunity to raise the question of the power of a District Court to issue such subpoenas. The judg-

ment appealed from is not, in fact, final and complete, and therefore should not be reviewed by this Court.

Petitioner requests the unusual remedy of summary reversal, on the ground that the presence of defendant in this country is creating "popular resentment" in Venezuela and other countries (Pet. 16-17). For that reason, petitioner asks this Court to dispense with orderly procedures for the determination of judicial controversies, and in effect to bow to the clamor of the press. To reinforce his argument favoring decision by headlines, petitioner sets forth reprints of newspaper articles dealing with defendant, and the hostile sentiments against him (P. A. 4). But this Court does not base its decisions upon the opinions of crowds, recognizing the truth of the dictum of the Roman historian, Livy: "Nothing is so uncertain or so worthless as the judgments of the mob."

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In short, the position of petitioner reduces to this: that the demanding country *ought to have* a power of discovery, in the United States, by subpoena duces tecum or otherwise; that such power must, therefore, be found somewhere, although petitioner has been unable to indicate any source of such power; and that this Court should declare, nevertheless, that the power does exist, because such power accords with petitioner's notions of sound political policy. We submit that if the demanding country ought to be granted the requested power as a matter of political policy, then Congress should expressly grant it, and this Court should not be asked to find it where it does not exist.

## POINT VI

**The petition for a writ of certiorari and for summary reversal should be denied.**

Respectfully submitted,

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Dated: New York, N. Y.
May 26, 1960

## APPENDIX A

### EXTRADITION: STATUTORY PROVISIONS, TITLE 18, U. S. CODE*

§ 3181. SCOPE AND LIMITATION OF CHAPTER.

The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

§ 3184. FUGITIVES FROM FOREIGN COUNTRY TO UNITED STATES.

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a

* Certain of the provisions have been omitted as not applicable to this proceeding.

copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

§ 3186. Secretary of State to Surrender Fugitive.

The Secretary of State may order the person committed under section 3184 or 3185 of this title to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.

Such agent may hold such person in custody, and take him to the territory of such foreign government, pursuant to such treaty.

A person so accused who escapes may be retaken in the same manner as any person accused of any offense.

§ 3188. Time of Commitment Pending Extradition.

Whenever any person who is committed for rendition to a foreign government to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary

of State, may order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered.

§ 3190. EVIDENCE ON HEARING.

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

§ 3191. WITNESSES FOR INDIGENT FUGITIVES.

On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpenaed; and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States.

§ 3195. PAYMENT OF FEES AND COSTS.

All costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority.

All witness fees and costs of every nature in cases of international extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, and the same shall be paid out of appropriations to defray the expenses of the judiciary or the Department of Justice as the case may be.

The Attorney General shall certify to the Secretary of State the amounts to be paid to the United States on account of said fees and costs in extradition cases by the foreign government requesting the extradition, and the Secretary of State shall cause said amounts to be collected and transmitted to the Attorney General for deposit in the Treasury of the United States.

## APPENDIX B

### EXTRADITION: TREATY BETWEEN THE UNITED STATES AND VENEZUELA, 43 STAT. 1698 (1923)*

#### ARTICLE I.

Reciprocal delivery of persons charged with crimes.

The Government of the United States of America and the Government of the United States of Venezuela agree to deliver up to justice, by means of requisition duly made as herein provided, any person who may be charged with or may have been convicted of any of the crimes committed within the jurisdiction of one of the Contracting Parties and specified in Article II of this Convention, while said person was actually within such jurisdiction when the crime was committed, and who shall seek an asylum or who shall be found within the territories of the other. Such surrender shall take place only upon such evidence of guilt as, according to the laws of the country in which the fugitive or accused shall be found, would justify his detention and commitment for trial if the crime or offense had been committed there.

#### ARTICLE X.

Delivery of articles seized with person.

Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime or offense, or which may be material as evidence in making proof of the crime, shall, so far as practicable according to the laws of either of the Contracting Parties be delivered up with his person at the time of the surrender. Nevertheless,

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* Certain of the provisions have been omitted as not applicable to this proceeding.

the rights of a third party with regard to the articles aforesaid shall be duly respected.

## ARTICLE XI.

**Territory affected.**

The stipulations of this Convention shall be applicable to all territories wherever situated, belonging to either of the Contracting Parties or under the jurisdiction or control of either of them.

**Requisitions.**

Applications for the surrender of fugitives shall be made by the respective diplomatic agents of the Contracting Parties. In case of the absence of such agents from the country or its seat of government, or where extradition is sought from territory included in the preceding paragraph other than the United States, application may be made by superior consular officers.

**Procedure.**

It shall be competent for such diplomatic or superior Consular officers to ask and obtain the preliminary arrest of the person whose surrender is requested, before the Government of whom such request is made. The judicial functionaries shall prescribe the method of complying with the legal formalities of the country of which the extradition is requested.

**Documents required.**

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

## ARTICLE XII.

Applications for provisional arrest.

If when a person accused shall have been arrested in virtue of the mandate or preliminary warrant of arrest, issued by the competent authority as provided in Article XI hereof, and been brought before a judge, or a magistrate to the end that the evidence of his or her guilt may be heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the Government asking for the extradition, it shall be competent to hold the accused for a period not exceeding two months, so that the demanding Government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused, and if at the expiration of said period of two months such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released, provided that the examination of the charges preferred against such accused person shall not be actually going on.

Release, if evidence, not produced.